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THE
CONSTITUTIONAL
CRITERION:

BY A
MEMBER
OF THE
UNIVERSITY OF CAMBRIDGE.

“ If ever there was a Conjuncture, in which it was important
“ to distinguish the Friends of the Constitution from its
“ Enemies, it is that in which we now are.”

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TO THE
RIGHT HONOURABLE
THE EARL OF CHATHAM.

MY LORD,

THE following observations
have for their subject the interests of a State, which has received from your public conduct security and splendor. The writer, impressed with sentiments of the most sincere respect for your Lordship's eminent qualities, desires to offer them to your attention.

THE

THE STATE OF CHATHAM

IN SENATE

January 1st 1881

REPORT

OF THE

COMMISSIONERS

OF THE LANDS

T H E

CONSTITUTIONAL

C R I T E R I O N.

S E C T. I.

IF ever there was a conjuncture, in which it was of consequence justly to estimate public principles and measures, it is that in which we now are. If ever there was a moment, in which it was necessary to distinguish the friends of the Constitution from its enemies, it is the present.

Introduction.

The following discussions have for their object, to establish a criterion for the ascertaining the constitutionality of political principles and political measures.

B

Does

Does this criterion consist in the observance of precedent and usage,—of judicial authorities,—of the forms of our government?—in the acts of the legislature? Do precedent, usage, and authority themselves require a criterion to determine their character? Can the forms of our government be unconstitutionally employed? Can the acts of the legislature be unconstitutional? These are questions of moment, and deserve consideration.

S E C T. II.

Of precedent,
usage, and
authority.

ON the ground of precedent, it becomes, I think, every man *to tread* with decency, but not with a blind submission.

In questions of private right, precedents are law. The observance of them is *universal*, and therefore, *substantial* justice; the public faith is pledged for it, the public credit depends upon it. They compose the *common medium* of civil intercourse, and should, like our coin, be preserved religiously from alteration or diminition. But in questions that regard the Constitution, they lose a principal part of their force, *what has been*, is by no means

means to be considered as the invariable rule for *what should be*. In our veneration for the wisdom of antient times, we are not to forget to do justice to the liberality of modern. Respect for the sentiments of our ancestors may influence, but should not prescribe our judgments. In all governments this respect has, I know, been frequently employed in maintaining the original rights of mankind; but it has been, I lament it, much oftener, and much more successfully employed in confirming the usurpations against them. Looking back to former ages of our own government, I perceive the flame of liberty serving only to make more visible the gloom of religious and civil superstition: stifled and almost extinguished by the precedents which were heaped upon it, I consider it to have been preserved by its native vigour alone. I conclude that the Constitution does not depend upon precedent, because it exists at this moment.

In many cases, rights at first imperfect and infirm acquire strength from age, they are confirmed by the exercise of them; but it is not so with the powers of government; they derive

their force from their intrinsic merit alone; originally bad, no prescription, no usage, however inveterate, can protect them. The rights of the individual, of the church, of the crown may have their respective limitations, but against those of the Constitution "no time can run *."

A more liberal employment, cannot in any government be imagined, than the application of human reason to its noblest object, the laws of a free people. There cannot be a purer source of honour, than distinguished character in this profession. That character, I understand, which rises to eminence in it, by a grandeur and elevation of mind, not that which is carried to it by arts which narrow the genius and deprave the affections.

But, bound as Judges are, by the nature of their office, to determine from usage and precedent, what has been observed on these subjects, may be applied to their opinions on constitutional questions. Great deference is undoubtedly to be paid to the enlarged and comprehensive view

* Nullum tempus occurrit.

they have, from what Lord Bacon calls "the 'vantage ground" of their situation; but, though in other case their judgments decide, here they merely inform.

S E C T. III.

THE Athenians, in that period of their government which succeeded the death of Epaminondas, made a law, by which it was rendered capital, for any one to propose the restoring to the establishment and maintenance of their army, those revenues, which had been converted to public exhibitions and entertainments.

Of the
forms of a
govern-
ment.

Libanius *, who gives us this anecdote, does not mention, that any of the forms of the Athenian constitution were, in this instance, neglected. Those who have made the human heart their study, will, it is likely, conjecture, quite the reverse to have been the fact. This degenerate act was probably passed with a studied solemnity. The ceremonials of the occasion were, we may suppose, observed with exactness. The writ was

* Argument. ad Olynthiac. 1.

issued,

issued, the meeting regularly called. The *Lexiarch* went about the avenues of the assembly collecting the members. The prayer and lustration were not omitted. The *Epistate*, *Prytanes*, and *Proedri* discharged their offices with an anxious attention to the several minutiae of them. After all these precautions was a law which struck at the very life of the State constitutional? Was a law which exposed the rights of the Athenians to invasion the law of liberty? I think it was neither. The Athenians at this moment were not free; the figure indeed of a free constitution remained, the animating spirit had taken its flight.

S E C T. IV.

Of the spirit of our Constitution.

THE spirit of our Constitution I define in two words, "Equal Liberty." I might quote it from the Great Charter*, but I find it in a

* This excellent statute is not, I presume, what is called an *enacting* law; it is a law *declaratory* of "the ancestral rights of this country."

higher

higher authority, the charter of our nature. It is the franchise of our soil; it impregnates our climate*.

Every precedent, usage, and authority in favour of this spirit is constitutional, and should be inviolably observed.

S E C T. V.

LIBERTY, in its primary and original sense, ^{Of liberty.} signifies simply, power unrestrained. Wherever we have an idea of power, we can conceive the interruption or restraint of it: wherever we can conceive the restraint or interruption of power, we have an idea of the absence of them; this idea is abstract liberty.

In its particular and definite signification, liberty receives its quality from the nature

* The resolution 11 Eliz. (Rushworth Hist. Coll. c. 2. p. 468.) "that the air of England is too pure for a slave to breathe in" has in our days received a solemn recognition.

of the subject to which it is applied. It has not been unfrequently considered as an exemption from law. I should think it might be defined "in every substance the power acting in obedience to the law of its nature."

Natural liberty of man.

If reason then be the distinctive character of man's nature, "the natural liberty of man will consist in the exercise of his powers agreeable to his reason."

Political liberty.

As political society is evidently a multiplication of the forces and wills of the several individuals which compose it, "political liberty must necessarily consist in the exercise of the powers of all by the direction of the reasons of all."

Now, the fundamental maxim of the Constitution we enjoy, the "government of all with the consent of all," is clearly resolvable into this position, "the exercise of the powers of every individual agreeable to the reason of every individual;" in other words, "Equal Liberty."

S E C T. VI.

THIS is our excellent theory ; but does the Objection. practice, it is asked, correspond with it ? The representative body is constituted by a part only of the people. The right of election is confined to persons of a certain description, in exclusion of many of the subjects and dependencies of the empire. Of the members even of this representation, all do not assent to the laws which are passed with its sanction ; many of them are enacted, not only without the consent, but with the express dissent, of a considerable number. If then the laws by which we are governed, are passed not only without the concurrence, or even privity of many, but expressly against the sense of some of the subjects of this country, how can they be said to be enacted with the consent of all ?

I have stated the objection, I believe, in its full force, and shall propose a solution of it.

Political
consent.

This maxim, I observe, in the strict and literal sense of the word, consent, is impossible; in its appropriated and political sense, it is perfectly clear and intelligible. Though it cannot be understood to mean the *express* and *positive* consent, it may, with the strictest propriety, mean the *implied* consent of every man. In this view, it is analogous to the contract upon which all society must be supposed to be founded. Rarely expressed, this contract is implied, from the nature of the subject. It is the plain suggestion of that common sense, which the Deity has imparted to every man. The same reasoning which supposes government to be founded on a contract, that it shall be employed for the advantage of every man; when it is so employed, implies the consent of every man to it.

If reason was in every man clear and uninfluenced, there could be no essential difference in the modes of government; man might be governed by one, or by millions. But this faculty is in every man obscured and biassed by a thousand circumstances of prejudice and passion. To remedy this imperfection, is the object of the art political;

political; and it is then most excellent, when, by a judicious alchimy, it extracts that pure sense which seeks the public good, from the baser principles which alloy it. This is that sense of the people, which is truly called the sense of the Divinity. This is the point of perfection to which, though it may never arrive, every form of government should tend.

The consent of all, therefore, is then implied when the laws of government have for their object the interests of all. That every law may bear this character, the form of our government is such as we see it. Every law which does bear this character, is the law of liberty; the subject of it, even in fetters, is free.

Laws have then for their object the interests of all when they respect the rights of the meanest equally with those of the highest individual; when the rights of no individual whatever suffer a greater diminution, than the public preservation strictly requires. This is the highest possible degree of liberty.

S E C T. VII.

Of the supreme legislative power.

“ I know not what Parliament may not do,” said one * of the greatest statemen this country ever enjoyed. *Parliamentum omnia potest*, is the assertion of one † of its greatest lawyers. The ‡ learned commentator on our laws has observed of “ the omnipotence of Parliament,” that it is “ rather too bold a figure.” Considering however its view, and the times in which it was used, it appears perfectly warrantable. It had in its object to emancipate Parliament from that political subordination, in which it was affected to be held, and to establish its just constitutional superiority over the pretensions of prerogative. Is then, it is asked in our times, its power unlimited? Divested of metaphor, the truth seems to be this.

Considered with respect to every other power, the Legislature is in every point of the British dominions politically *supreme*; since, through the

* Cecil, Lord Burleigh.

† Lord Coke.

‡ Justice Blackstone.

whole of this extended empire, there can be no political power *equal* or *superior* to it. This is all that the word "supreme" can of itself and in its natural import, be understood to signify. Considered with respect to the exercise of it, this power is necessarily limited, from its nature. The ideas of supreme power, and the ~~un~~limited exercise of it, are so far from excluding, that they suppose each other. A power is therefore supreme because the powers of all are vested in it; the powers of all are vested in it, with the implied consent of all; the consent of all is implied, upon this only motive, that the supreme power shall be exercised for the interest of all. Here then the limit to this power is fixed.

The unlimited exercise of power cannot, in truth, be ascribed to a moral agent without contradiction. Even that high being to which, in utmost stretch of imagination, we attribute omnipotence, limits his infinite power by his infinite justice.

The

The limit therefore to the supreme legislative power is that which limits every other nature, the principle of its constitution.

The principle of its constitution may be defined in this manner. It is a body composed *in a certain form* of which an *essential, constituent part* is *freely elected* and to which the public force is entrusted for the preservation of *equal liberty*.

That it shall preserve its form ;—that it shall maintain inviolate the freedom of election :—that it shall employ the public force for the preservation of equal liberty ; are the laws to which it is subject, because they are the laws of its nature. These laws it cannot transgress, without changing its character, without ceasing to be that which it is, a government by consent. The just liberty of this power these laws do not diminish ; they direct it to every beneficial and salutary purpose, the self-destructive exercise of it alone they restrain.

S E C T. VIII.

THE restrictions that have been submitted furnish an answer to a very important question, a question which, by a singular mode of discussion, has been argued at the expence of our best blood and treasure. Can the supreme legislative power be exercised *in every case whatsoever over every part* of the empire? It can be exercised through the whole of the empire in every imaginable case to which the universal consent of the empire can be implied. The marks of this consent have been already stated. An instance will illustrate them.

Of colo-
nial taxa-
tion.

In the different modes of taxation no essential distinction can be discovered; they may have however an accidental one. The general and abstract nature of government considered, no satisfactory reason can be assigned, why the power which is exercised in one case, and over one part of the empire, should not be exercised in another case, and over another part of it; why the power which

which imposes one species of taxation, cannot impose another. The particular constitution of a government however may create a very important distinction. I apply the criterion to the mode of internal and that of external taxation.

In the system of external or commercial taxation established by our navigation acts, the great charter of colonial government, the interests of every part and of the whole were inseparably blended. The interests of one part of the dominions could never be sacrificed to those of another; no partial or inordinate tax could be imposed to oppression of one part and exoneration of another. The duties that were charged, were returned to those who paid them, with accumulated increase in their share of the general prosperity. To this admirable system, therefore, the universal consent of the empire was necessarily implied; this was the *constitutional* system. Distinguished from this in every respect the system of internal taxation,——

—SED PRÆSTAT MOTOS COMPOSERE FLUCTUS.

S E C T.

S E C T. IX.

“ The pure solar system of English govern-
 “ ment and English liberty”*, splendid figure !
 uniting the first objects in the natural and moral
 world ! Can there in effect be one more truly
 deserving of philosophical admiration than a
 system in which the various parts of empire re-
 volve in their several spheres round one com-
 mon center—the centrifugal affections of their
 different interests corrected by their attraction
 to the general prosperity—warmed and enlight-
 ened by emanations from the source of that ge-
 nuine liberty by which the whole is pervaded ?—
 In the name of humanity, shall this system be
 merely a fiction ?

Image of
the rela-
tion of

Great Bri-
tain to its
dependen-
cies.

* Speech against the suspending and dispensing prerogative, &c.

S E C T. X.

Of the supreme executive power.

“ The King can do no wrong”. There are two constructions of this maxim. The spirit of the one preserves the public respect and affection for the royal person, the brightest jewels of sovereignty, unfullied and in their true lustre. Acts of mercy, of benevolence, of popularity, are supposed to flow from his benignant nature. Acts unjust, unmerciful, unpopular, are ascribed to the influence of sinister and inauspicious counsels. The Minister knows he is responsible for the measures he undertakes and supports; to him therefore, if they are reprehensible, with the strictest propriety and justice they are imputed. Thus the Father of his People is never presented to them, but in the most gracious and amiable point of view. This maxim has however another construction of, at least equal political importance.

“ *Nihil aliud potest rex, nisi id solum quod de jure potest* *.” In the crown the supreme executive

* Bracton, l. iii. tr. i. c. 9.

cutive power is vested, but the supreme executive power cannot be exercised against law; against the written acts of the legislature and, *a fortiori*, against that law to which the legislature itself is subject, the unwritten law of the Constitution; illegally, or unconstitutionally.

To illustrate,—the defensive force of the State is, by the form of our government, vested in the crown in virtue of its executive character. But, by the spirit of the Constitution, it cannot raise supplies for the support of this force without the consent of Parliament. This provision has two objects.

First, That no one shall be *compelled* to pay any imposition but such as he has *politically* consented to. In this view the personal property of the individual is protected. It is obvious, however, that if this provision had no other view, the personal property of the individual, as well as every other civil right, would be insecure. If by any means whatever, the crown could subsist a force without the consent of Parliament—the Consti-

tution (or what is the same thing the security of it) would be no more.

The other construction therefore of this maxim is, That the crown shall, on *no pretence whatever*, receive supplies for the subsistence of the public force, *through any other medium*, than that of Parliament.

Of all, even the most distant approaches to this power, the representative body, to which it is entrusted, have been more jealous, than of any other whatever. And with reason. The instrument of forming the Constitution, it is that of its preservation; it is its support and defence. Accordingly, there is no point on which Parliament has, in all times, so scrupulously and anxiously declared its sense. By a variety of acts, from Magna Charta down to the declaration of rights, the exercise of this power by the crown is declared to be illegal*.

* The spirit of all these statutes restrains not only the power of taking by the crown but the power of giving by others. In this view the words of the declaration of rights
and

In considering the executive power it is not to be omitted, that possible cases may be imagined in which the first law of the State, the preservation of it, silences every other. In such cases as imminently and intimately endanger the public safety, delay might be ruin; the executive power does not wait for the direction of positive laws but acts in conformity to that law which is the origin of them all. But such cases are rare, and the necessity of them must be strict and inevitable. Of this necessity the crown is not the only judge; Parliament must assent to it, if not in the first instant, in that immediately subsequent to it. With this sanction, such an exercise of the executive power appears perfectly constitutional. It is the employment of the powers of all, for the preservation of all.

and of the statute commonly entitled *de tallagio non concedendo*, &c. are remarkably comprehensive—they evidently declare that Parliament alone had the power of *conceding* or granting supplies. Sure I am that if *remedial* statutes should receive liberal construction *constitutional* acts should receive it too.

SECT.

S E C T. XI.

Conclusion. I HAVE endeavoured, in the foregoing observations to establish that criterion, a conformity to which renders every principle, authority and power of government constitutional. I have endeavoured to fix the spirit of the Constitution.

This spirit alone should recommend men and measures distinguished by it to the favour of their country in every juncture of public affairs, more especially in the more arduous crises of them.

When this spirit has prevailed, the national resources have unfolded themselves in proportion to the danger and difficulty of our situation. Our successes have rendered us flourishing at home, and respectable abroad.

When the contrary spirit has prevailed (our history supports the observation) its malignant influence has been marked by our rapid declension

sion—Every fair prospect of liberty, commerce, and national greatness, has been blasted—Unhappy at home we have been degraded abroad—our situation has provoked the pity of our friends, the insults of our enemies.

To the preservation of this spirit no public consideration can be too dear to be sacrificed. While this Palladium remains among us, the State is never to be despaired of; the act that forces it from us, makes us no more a people.

F I N I S.

(22)

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